Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PMC, INC.,
Petitioner,

v.

THE SHERWIN-WILLIAMS COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should resolve the Circuit court split over whether Congress, in establishing the right of contribution under CERCLA Section 113(f)(1), intended to preempt state law claims to recover environmental response costs when: (1) CERCLA Section 302(d) expressly states that it does not affect or modify the obligations or liabilities of any person under state law; and (2) Section 114(b) expressly allows plaintiffs to recover damages under either state law or CERCLA?

RULE 29.6 LISTING

PMC Global, Inc. is the parent of PMC, Inc. PMC, Inc. has no non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner PMC, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entered July 30, 1998, is reported at 151 F.3d 610 (7th Cir. 1998), and is reprinted at Appendix A hereto. The order and opinion of the United States District Court for the Northern District of Illinois, entered April 23, 1997, is reported at 45 Env't Rep. Cas. (BNA) 1335, and is reprinted at Appendix B hereto.

JURISDICTION

The Seventh Circuit entered its judgment on July 30, 1998. Neither party has filed a petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9613(f)(1), provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

Section 114(b) of CERCLA, 42 U.S.C. §9614(b), provides:

> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

Section 302(d) of CERCLA, 42 U.S.C. §9652(d), provides:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

Section 2(a) of the Illinois Joint Tortfeasor Contribution Act (the "Illinois Contribution Act" or "Act"), 740 ILCS 100/2(a), provides:

> Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

STATEMENT OF THE CASE

This case arises from PMC, Inc.'s ("PMC") attempt to recover from The Sherwin-Williams Company ("Sherwin-Williams") the costs necessary to address environmental contamination caused by Sherwin-Williams' historic manufacturing activities at a facility located in Chicago, Illinois, as well as injunctive relief directing Sherwin-Williams to undertake response actions in the future. PMC filed suit in the United States District Court for the Northern District of Illinois, seeking both to recover response costs it has already incurred, and to enjoin Sherwin-Williams to complete necessary future response activities. After a bench trial, the District Court for the Northern District of Illinois awarded PMC damages for response activities under both CERCLA and the Illinois Contribution Act, and enjoined Sherwin-Williams to complete necessary future response activities. The Court of Appeals for the Seventh Circuit, among other things, reversed the award of damages under the Illinois Contribution Act, holding that CERCLA preempts state contribution laws.

A. Factual Background.

Beginning in at least 1888, Sherwin-Williams owned and operated a manufacturing facility on the south side of Chicago, a portion of which subsequently became the PMC Facility. April 23, 1997 Memorandum Opinion Findings of Fact, App. B at B2, B3. During the nearly 100 years prior to 1985, Sherwin-Williams manufactured and used a variety of chemicals at the Historic Sherwin-Williams Site, many of which are hazardous substances under CERCLA. App. B at B3-B4. The vast majority of the area that now comprises the PMC Facility was created by Sherwin-Williams' filling-in of Lake Calumet. App. B at B5. Sherwin-Williams accomplished this filling, in part, by disposal of its industrial wastes containing hazardous substances from its operations. App. B at B4.

In 1985, PMC purchased assets of the PMC Facility from Sherwin-Williams. App. B at B3. The transaction closed on June 30, 1985. *Id.* On at least five occasions after acquiring the

business, PMC discovered hazardous substances in the soil underlying the PMC Facility. App. B at B7-B10. These substances included metals (such as arsenic and lead) as well as organic chemicals at toxic or hazardous levels. App. B at B5-B6. The District Court found that Sherwin-Williams' past operations and disposal activities were the sole source of the hazardous substances found in the soil, App. B at B7-B10, and that the site-wide contamination remaining at the PMC Facility was exclusively attributable to Sherwin-Williams. App. B at B5-B6.

B. Regulatory Framework.

1. Legislative Intent Of CERCLA.

Congress enacted CERCLA in 1980 in response to growing concern about the dangers posed by hazardous waste sites. The express goals of the legislation were to facilitate the cleanup of environmental contamination, and to impose the response costs on those responsible for the pollution. *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (CERCLA's two main purposes are to assure prompt cleanup of hazardous waste sites and impose cleanup costs on the party responsible) (quoting *General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991)).

A second major goal of CERCLA is to encourage voluntary cleanup of hazardous waste sites. *Bethlehem Steel Co. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990) (referring to "the manifest intent of Congress to encourage voluntary cleanup action"). "A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary cleanup cannot be what Congress had in mind." *Nurad, Inc. v. Hooper and Sons Co.*, 966 F.2d 837, 845-46 (4th Cir. 1992) *cert. denied,* 506 U.S. 940 (1992). The statute thus seeks to facilitate the ways in which responsible parties can recover response costs from polluters.

As numerous courts have observed, Congress intended CERCLA to be a remedial tool to address environmental contamination, and courts must construe it liberally to fully effectuate its goals. *See, e.g., B.F. Goodrich v. Murtha*, 958 F.2d 1192,

1197 (2d Cir. 1992) ("In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[] the environment and human health."); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989) (CERCLA is a "broad response and reimbursement statute").

2. Contribution Under CERCLA.

CERCLA imposes liability on "any person" who "owns" or "operates" a "facility" where "hazardous substances were disposed of" for "response costs" incurred in response to a "release or threatened release" of "hazardous substances" consistent with the National Contingency Plan ("NCP"). Section 107(a), 42 U.S.C. §9607(a). Liability under CERCLA extends to a variety of "responsible parties," including both the current owner and operator of a facility, as well as any person who owned or operated the facility at the time of hazardous substance disposal, and is joint and several. *Id.*

To assure equitable allocation of response costs between responsible parties, Congress added a contribution provision in the 1986 amendments to CERCLA. Section 113(f)(1), 42 U.S.C. §9613(f)(1). Section 113(f)(1) directs courts to employ equitable factors in allocating response costs:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. . . .In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court deems are appropriate.

Id. Thus, CERCLA's joint and several liability structure requires equitable allocation among responsible parties. The fact that a person may be a "responsible party," however, does not mean that it will bear any of the response costs. In cases with more than one party, a court may employ equitable factors to exonerate an otherwise liable party and require more responsible parties to bear the

cost of the entire cleanup. *See, e.g., Environmental Transportation Systems, Inc. v. Ensco, Inc.*, 969 F.2d 503, 507 (7th Cir. 1992) (affirming allocation of 100% of all response costs to one of two responsible parties).

3. The Illinois Contribution Among Joint Tortfeasors Act.

The Illinois Contribution Among Joint Tortfeasors Act (740 ILCS 100/1, referred to herein as the "Illinois Contribution Act") creates a right of contribution among tortfeasors who are jointly responsible for injury to a third party. The Illinois Contribution Act provides, among other things, a basis on which individuals may recover environmental response costs. *People v. Brockman*,148 Ill. 2d 260; 592 N.E.2d 1026 (1992).

C. Proceedings Below.

On March 5, 1993, PMC filed suit in the District Court for the Northern District of Illinois seeking compensatory, injunctive, and declaratory relief in connection with its purchase of the PMC Facility, as well as past and future costs incurred in responding to actual or threatened releases of hazardous substances at the PMC Facility. PMC's Complaint sought: recovery of already-incurred response costs under §107 of CERCLA, 42 U.S.C. §9607 (Count I); contribution from Sherwin-Williams under §113(f)(1) of CERCLA, 42 U.S.C. §9613(f)(1), (Count II) and the Illinois Contribution Act, 740 ILCS 100/1 *et seq.*, (Count III) for response costs; an injunction under RCRA requiring Sherwin-Williams to alleviate the imminent and substantial endangerment to health and the environment caused by its actions (Count IV); damages for breach of contract in failing to reimburse PMC for response costs (Count VI); damages for fraud in the sale of the PMC Facility to PMC (Count VII); and theories of trespass (Count VIII), nuisance (Count IX), negligence (Count X), and willful and wanton negligence (Count XI) relating to the seepage of Sherwin-Williams' contamination onto the PMC property. PMC's complaint also sought declaratory relief related to all counts in the complaint (Count XII). The District Court exercised jurisdiction over

PMC's CERCLA claims pursuant to CERCLA Sections 107(a) and 113(f); and over PMC's RCRA claims pursuant to RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B). The district court exercised supplemental jurisdiction over PMC's state law claims, as supported by the federal question claims, pursuant to 28 U.S.C. § 1367.

In November 1996, the district court conducted a bench trial as to Counts I-IV. The court heard extensive testimony about Sherwin-Williams' history of waste disposal and landfilling practices at the PMC Facility as well as the site-wide extent of contamination and its exceedence of recognized standards. PMC identified nine responses to contamination (referred to as "Occurrences #1-9"[1/]) and sought to recoup the costs it incurred in responding to Occurrences #4-9 under CERCLA and the Illinois Contribution Act, as well as seeking injunctive relief under RCRA and declaratory relief under CERCLA concerning future response costs. The district court found that Sherwin-Williams was liable for all of the contamination at the PMC Facility for which response actions were necessary. App. B at B5-B6. Accordingly, under CERCLA (Counts I and II), the Court awarded PMC damages for Occurrence #9, which consisted of the Remedial Investigation/Feasibility Study ("RI/FS") PMC conducted at the PMC Facility. The court equitably allocated 100% of the financial responsibility under CERCLA for those costs and all future response costs to Sherwin-Williams. App. B at B18, B20-B21.

The district court disallowed PMC's CERCLA claims for Occurrences #4 through #8, finding that the response activities did not conform to National Contingency Plan ("NCP") public notice requirements. App. B at B18. However, because the court concluded that Sherwin-Williams was exclusively liable for all of the contamination, it awarded PMC 100% of the costs for

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[1/] For simplicity, PMC has referred to the nine instances in which it responded to the presence of hazardous substances as "Occurrences" 1 through 9. The district court adopted this designation in its April 23, 1997 order.

Occurrences #4-8 under the Illinois Contribution Act. App. B at B22. Finally, the Court entered an injunction under RCRA declaring the existence of an imminent and substantial endangerment due to contamination at the facility, enjoining Sherwin-Williams to abate the danger, and awarding PMC its attorneys fees. App. B at B24-B25. The Court entered Judgment on April 23, 1997.

In a July 30, 1998 decision, the Seventh Circuit upheld the district court's ruling that Sherwin-Williams was 100% liable for Occurrence #9 (the RI/FS) under CERCLA, and that under RCRA, Sherwin-Williams was obliged to abate the imminent and substantial endangerment. App. A at A15.[2/] However, the Seventh Circuit reversed the award of damages to PMC for Occurrences #4-8 under the Illinois Contribution Act. *Id.* Disregarding the plain language of CERCLA, which provides that nothing in CERCLA affects liabilities under state law, the court found that CERCLA's contribution provision preempts state law contribution claims relating to environmental contamination. App. A at A11. The Seventh Circuit held that, because the Illinois Contribution Act does not require consistency with the NCP (as CERCLA §113 (f)(1) does), allowing PMC to recover under the Illinois Contribution Act would "nullify" CERCLA. *Id.* The court pointed to nothing in CERCLA or its legislative history as support; it instead concluded that CERCLA contribution is available only to "victims" of environmental contamination; that PMC was not such a "victim" even though it was not responsible for the contamination driving the remediation; and that PMC should be denied recovery of response costs under state law as a "sanction" for not following of all of the requirements of the NCP.

[2/] While it upheld the district court's finding of imminent and substantial endangerment under RCRA, the court found that the injunction was excessively vague under Federal Rule of Civil Procedure 65; the court therefore vacated the injunction and remanded the case for entry of an injunction that complies with Rule 65. The court also remanded the award of RCRA attorney fees to PMC. Neither ruling is relevant to this petition.

App. A at pp. 11-12. The court concluded that the Illinois Contribution Act award would "gut" CERCLA by nullifying this sanction, and thus found the state law was preempted. *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because the Seventh Circuit's decision, as well as a 1998 Second Circuit and a 1997 Third Circuit decision also finding preemption, create a direct and significant conflict with decisions by the Ninth and Tenth Circuits regarding whether CERCLA generally preempts state law claims. The Second, Third and Seventh Circuits' findings of preemption create a national patchwork of inconsistent interpretations regarding CERCLA and its interaction with state law. In addition, the Seventh Circuit's decision significantly undercuts the right and ability of states to regulate environmental contamination within their own boundaries.

In finding that CERCLA's right of contribution, § 113(f)(1), conflicts with and therefore preempts the Illinois Contribution Act for claims relating to environmental contamination, the Seventh Circuit improperly disregarded the plain language of two other sections of CERCLA: the broad non-preemption clause in §302(d), 42 U.S.C. §9652(d), which clearly and unambiguously preserves to litigants the right to recover environmental response costs under both state and other Federal laws; and the double recovery provision in §114(b), 42 U.S.C. §9614(b), which expressly bars compensation for the same damages under both CERCLA and state law. The only interpretation of §§302(d) and 114(b) that gives full effect to the statute's plain language and Congress' intention of making polluters pay for environmental response actions is that litigants have the option of seeking to recover response costs under *either* CERCLA or other applicable Federal or state laws, including the Illinois Contribution Act. The Second, Ninth and Tenth Circuits have found no preemption of state law claims precisely because of §§302(d) and 114(b). This fundamental conflict between the Ninth and Tenth Circuits on the one hand, and the Seventh, Second and Third Cir-

cuits on the other can be resolved only by this Court's grant of this petition and decision on this preemption issue.

I. THE SEVENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF CERCLA CONFLICTS WITH EARLIER RULINGS OF THE NINTH AND TENTH CIRCUITS.

The Seventh Circuit's holding that CERCLA preempts state law contribution claims for the recovery of environmental response costs conflicts with rulings of the Ninth and Tenth Circuits, which have found that CERCLA does not preempt state laws.

In *Stanton Road Assoc.'s. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993), the defendant was solely responsible for pollution that existed on the plaintiffs' property. The plaintiffs sought to recover response costs under CERCLA as well as state common law theories of negligence, trespass and nuisance. The Ninth Circuit allowed the plaintiffs to proceed under state laws to recover the response costs. It based this conclusion on the existence of CERCLA §302(d), which the Ninth Circuit interpreted as allowing recovery of response costs under state common law theories regardless of whether the costs are recoverable under CERCLA. *Id.* The court discounted as "meritless" the defendant's claim that CERCLA preempts state common law. The defendant's argument was exactly what the Seventh Circuit has now adopted: that allowing the recovery of response costs under state common law would allow the plaintiffs to circumvent CERCLA's requirements of necessity and consistency with the NCP. *Id.* at 1021.

The Ninth Circuit also supported its conclusion by pointing to CERCLA §114(b), which prohibits plaintiffs from recovering a single set of response costs under both CERCLA and state

claims. 42 U.S.C. §9614(b). The court recognized that the existence of §114(b) means that CERCLA is not the sole remedy available to plaintiffs to recover response costs, and that plaintiffs have the option of seeking recovery under state law claims as well. The court reasoned that §114(b) would be both "unnecessary and inexplicable" if CERCLA preempted state law claims. *Stanton Road,* 984 F.2d at 1022 (quoting *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991)). Thus, the Ninth Circuit has summarily rejected the exact preemption argument that the Seventh Circuit has adopted. *Accord Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 n.8 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167, 116 S. Ct. 1568 (1996) (CERCLA preserves plaintiffs' right to pursue state law remedies).

The Tenth Circuit has reached the same conclusion as the Ninth Circuit in *Stanton Road*, finding no preemption by CERCLA and thus upholding state law claims to enjoin environmental response actions, irrespective of whether the actions were consistent with the NCP. The Tenth Circuit case of *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994), involved claims both for relief under both CERCLA the Colorado Hazardous Waste Management Act ("CHWMA"). The Tenth Circuit court rejected the argument that CERCLA preempted overlapping provisions of the state CHWMA, relying on Section 302(d)'s preservation of state law claims. *Id.* at 1576. The court concluded that the only reading of Section 302(d) that can give effect to Congress' intent in enacting the statute was that the plaintiff must be allowed to pursue claims under both CERCLA and the state law. *See also Cropwell Leasing Co. v. NMS, Inc.*, 5 F.3d 899, 901 (5th Cir. 1993) (Section 302(d) preserves the government's right to pursue response costs under other federal or state laws). Thus, under the Ninth and Tenth Circuit's finding of no CERCLA preemption, a plaintiff can seek both CERCLA and state law contribution to allocate responsibility for environmental contamination, subject only to the double recovery prohibition of CERCLA §114(b).

In 1997, the Third Circuit reached a contrary conclusion as the Ninth and Tenth Circuits, and found that CERCLA pre-

empts state contribution laws. *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997).[3/] *Reading* involved third-party claims for contribution under both CERCLA and state law for environmental contamination at a single site. *Reading*, 115 F.3d at 1111. The Third Circuit found a direct conflict between CERCLA Section 113(f) and the state contribution law, and concluded that CERCLA preempts such claims. The court reasoned that through CERCLA, Congress expressly created a statutory right of contribution as part of an "elaborate settlement scheme aimed at the effective resolution of environmental disputes." *Id.* at 1117. The court concluded that allowing independent state law contribution remedies would create a path around Congress' elaborate scheme, and impose an obstacle to the Congressional intent of resolving such disputes. Because this would obstruct the Congressional intent of CERCLA Section 113(f), the court ruled that CERCLA preempts any state law claims for contribution. *Id.*

The Second Circuit has likewise recently held that CERCLA preempts certain state common law claims. *Bedford Affiliates v. Sills,* Nos. 97-9245, 97-9267, 1998 U.S. App. LEXIS 24270 (2d Cir. Sept. 28, 1998) The plaintiff in *Bedford* sought to recover environmental response costs under both Section 113(f) and state common law claims for restitution and indemnification. The court upheld the plaintiff's claim for contribution under § 113(f). *Bedford,* 1998 U.S. App. Lexis 24270 at *45. In evaluat-

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[3/] The Third Circuit initially embraced the conclusion that CERCLA did not preempt state law claims. In *Manor Care, Inc. v. Yaskin*, 950 F.2d 122 (3d Cir. 1991), involving claims for environmental response costs under the New Jersey Spill Act, the defendant sought to avoid liability by claiming that CERCLA preempted the New Jersey Spill Act by establishing a comprehensive Federal statutory scheme which did not allow for supplemental state remedies. *Manor Care*, 950 F.2d at 124. The Third Circuit rejected this argument because Section 302(d) specifically preserves state claims. *Id.* at 126. The court also supported its conclusion with reference to CERCLA's double-recovery provision at §114(b), 42 U.S.C. §9614(b), reasoning that this provision would be unnecessary if CERCLA preempted state law. *Id.* at 127. *Accord, Witco Corp. v. Beekhuis,* 38 F.3d 682, 688-90 (3d Cir. 1994).

ing the plaintiff's state common law claims, the court found that CERCLA generally does not preempt state law, and does not prevent states from enacting laws to supplement CERCLA. *Bedford,* 1998 U.S. App. LEXIS 24270 at *26-27 (citing its earlier decision in *New York v. Shore Realty,* 759 F.2d 1032, 1041 (2d Cir. 1985)("CERCLA expressly does not preempt state law")). The court nevertheless concluded that allowing a plaintiff to recover response costs under state common law claims for restitution and indemnification "would bypass [CERCLA's] carefully crafted settlement system, creating an actual conflict" between CERCLA and state common law. *Bedford,* 1998 U.S. App. LEXIS 24270 at *29. The Second Circuit therefore concluded that CERCLA preempts state law claims for restitution and indemnification. *Id.*

Thus, in the Second, Third and Seventh Circuits, a plaintiff can only seek CERCLA contribution and cannot have a responsible party held accountable for its share of environmental contamination if the plaintiff did not comply with the provisions of the NCP. The rulings have created a conflict regarding how CERCLA preempts state law claims, with the decisions of the Ninth and Tenth Circuits finding against preemption in light of Sections 302(d) and 114(b). The Court should therefore grant this petition in order to resolve this conflict and provide a uniform federal rule that gives full effect to the plain language of the statute and the underlying Congressional intent.

CONCLUSION

For the foregoing reasons, PMC, Inc. respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 97-2884 & 97-3773

PMC, INC.,

Plaintiff-Appellee,

v.

SHERWIN-WILLIAMS COMPANY,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No 93 C 1379—**Paul E. Plunkett**, *Judge*.

ARGUED FEBRUARY 25, 1998—DECIDED JULY 30, 1998

Before POSNER, *Chief Judge*, and HARLINGTON WOOD, JR., and DIANE P. WOOD, *Circuit Judges*.

POSNER, *Chief Judge*. In 1985, PMC, the plaintiff in this toxic-waste suit, bought from the defendant, Sherwin-Williams, a plant on the south side of Chicago in which Sherwin-Williams had been manufacturing paints, insecticides, and other chemicals for a century or so. Since 1992, PMC has been required by Illinois' environmental protection agency to clean up toxic waste discovered at the site, and it faces the prospect of future costs in an unknown amount to comply fully with the agency's demands. On the authority of sections 107(a) and 113(f)(1) of CERCLA (Comprehensive Environmental Response, Compensation and Li-

ability Act, 42 U.S.C. §§ 9607(a), 9613(f)(1)); RCRA (Resource Conservation and Recovery Act, 42 U.S.C. §§ 6900 *et seq.*), and the Illinois Contribution Act, 740 ILCS 100/1 *et seq.*, PMC seeks to recover from Sherwin-Williams both the costs that it has incurred and the costs that it will incur. After a bench trial, the district judge awarded essentially all the relief asked for by PMC, including recovery of past costs under the state statute and of future costs under CERCLA; an injunction, largely duplicative of the CERCLA relief, under RCRA directing Sherwin-Williams to assume full responsibility for cleaning up the site; and an award under RCRA of PMC's attorney's fees allocable to obtaining the injunction. Basically, the fight is over five clean ups that PMC has already conducted, one costly environmental site-assessment that it conducted in advance of the clean ups, and the costs of whatever future clean ups PMC may be required to conduct.

Both companies, as respectively the owner of the polluted site and the former owner who polluted it, are liable under CERCLA (see 42 U.S.C. § 9607(a)) and other enviromental statutes for the expense of cleaning up the site. Parties are free, however, to allocate such expenses between themselves by contract. See, e.g., 42 U.S.C. §§ 9607(e)(1); *Truck Components Inc. v. Beatrice Co.*, 143 F.3d 1057, 1059 (7th Cir. 1998); *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 327 (7th Cir. 1994). Some cases add that the contract must do this "clearly" to be enforceable. *Olin Corp. v. Yeargin Inc.*, No. 97-5606, 1998 WL 295683, at *8 (6th Cir. June 9, 1998); *Lion Oil Co. v. Tosco Corp.*, 90 F.3d 268, 270 (8th Cir. 1996); *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 91-92 n. 4 (3d Cir. 1994). The statutes don't say this; nor has this court said it; but the cases we have cited note that contracts by which a tortfeasor seeks to shift the financial responsibility for his torts to another person (unless the other person is an insurance company!) are generally construed narrowly.

Sherwin-Williams does not question this principle of interpretation or its application to CERCLA, and so we need not pursue the matter further. It argues that the contract of sale did clearly allocate to PMC all clean-up costs that accrued more than

two years after the sale. It points to a clause which provides that "all representations, warranties, covenants and obligations contained in this Agreement shall terminate twenty-four (24) months after the Closing Date." The district judge, however, pointed to another provision of the contract: "S-W expressly recognizes its responsibility for the following matters"—and the matters then set forth include all environmental harms resulting from toxic waste activities at the site before the sale. The judge found no ambiguity in the language of the contract that would justify taking evidence to determine whether the 24-month cut-off might apply to liability for toxic wastes; he thought it evident from the "expressly recognizes"' clause that it did not.

We think he was right. Read naturally, the cut-off provision refers to obligations created by the contract itself, such as warranties, rather than to obligations created by law. The former are obligations "contained" in the contract; the latter are not. Sherwin-Williams didn't want PMC to be bringing a suit for breach of warranty many years after the sale; hence the two-year cut-off. But by the same token PMC didn't want to be stuck with the liabilities that Sherwin-Williams had incurred as a result of operating a chemical plant. Applying the two-year cut-off to Sherwin-Williams's statutory obligations would extinguish PMC's legal rights to obtain from its seller a sharing of the costs of whatever clean-up duties the environmental protection authorities might impose on it. It could be argued that Sherwin-Williams would be unlikely to write PMC a blank check for the cost of clean-up, lest PMC decide to make the site superclean. But against this it could be argued that Sherwin-Williams probably knew better than PMC how polluted the site was and hence could better estimate the cost of cleaning it up, especially since Sherwin-Williams retained ownership of a property, for which it had clean-up responsibilities, contiguous to the property that it sold to PMC. These speculative arguments cancel, leaving us with contractual language unambiguously supportive of PMC's interpretation.

Sherwin-Williams wants to introduce evidence that would *create* an ambiguity. The doctrine of extrinsic (or latent) ambigu-

ity on which it relies (a doctrine that is a part of Ohio law, which the contract provides shall govern any disputes arising under it) rests on a recognition that a contract which might appear to be perfectly clear to someone who read it in ignorance of its context might, once context was restored, seem either unclear, or clear the opposite way. E.g., *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996); *Shifrin v. Forest City Enterprises, Inc.*, 597 N.E.2d 499, 501 (Ohio 1992); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Pierce v. Atchison, Topeka & Santa Fe Ry.*, 65 F.3d 562, 568 (7th Cir. 1995). For example, if the contract used common words in a technical sense, as in *Mathews v. Sears Pension Plan, supra*, 144 F.3d at 466-67; *AM Int'l, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 575 (7th Cir. 1995), and *Kerin v. U.S. Postal Service*, 116 F.3d 988, 992 and n. 2 (2d Cir. 1997), a judge who, ignorant of the technical meaning, took the ordinary to be the intended meaning would be fooled. He would be like a judge who tried to interpret a contract written in French without knowing the French language.

But if the doctrine of extrinsic ambiguity were stretched too far, an important function of a written contract—protecting the parties from the vagaries of a judge's or a jury's weighing of the parties' self-serving testimony as to what they *really* meant (opposite to what the contract, seemingly clearly, said)—would be thwarted. This is why, to be admissible to create an ambiguity in a clear-seeming written contract, the extrinsic evidence must be objective. *Mathews v. Sears Pension Plan, supra*, 144 F.3d at 467; *Home Ins. Co. v. Chicago & Northwestern Transportation Co.*, 56 F.3d 763, 768-70 (7th Cir. 1995); *AM Int'l, Inc. v. Graphic Management Associates, Inc., supra*, 44 F.3d at 575. That is, it must be evidence from which an inference about the parties' intentions in making the contract can be drawn with considerably greater confidence than if the parties were merely testifying to their private understandings of what the contract meant but failed to say. See *Pierce v. Atchison, Topeka & Santa Fe Ry., supra*, 65 F.3d at 568; *Home Ins. Co. v. Chicago & Northwestern Transportation Co., supra*, 56 F.3d 763, 768. Evidence of trade

usage satisfies this criterion because it can be given by people who neither are, nor have any relation to, the parties to the contract. An admission would likewise satisfy the criterion of objectivity.

But it is not enough that a party has *some* objective evidence to offer on the meaning of the contract. The evidence must create a sufficient doubt about what the contract means to warrant submitting that meaning to determination by a trial, notwithstanding the apparent clarity of the written word. The three bits of evidence sought to be introduced by Sherwin-Williams do not satisfy this test. Cf. *Mathews v. Sears Pension Plan, supra*, 144 F.3d at 467. The first is a letter from the lawyer for PMC who drafted the contract to an employee of Sherwin-Williams suggesting that the cut-off provision be amended to include an express disclaimer that the provision applies to common law or statutory obligations. The disclaimer was not included in the contract—but for all that anyone knows it was omitted merely as being unnecessary in light of the actual wording of the cut-off ("obligations *contained in this Agreement*") and retained-liabilities provisions. Second, an expert witness offered to testify that disclaimers of environmental liability were common at the time the contract was made. This says nothing about whether this particular contract contained such a disclaimer. Third, an executive testified that over the course of negotiating the contract the purchase price was cut in half in recognition of Sherwin-Williams's disclaimer of environmental liabilities. This is just the kind of self-serving testimony that the extrinsic-ambiguity doctrine does *not* permit—the uncorroborated testimony of one of the parties about what he understood the contract to mean. That testimony does not become less self-serving by the addition of a reason for the understanding, unless the reason can be substantiated.

This is not to deny that a contract's price term can be helpful evidence of the contract's meaning (and, of course, it's objective evidence—it is part of the written contract). *Rhone-Poulenc, Inc. v. International Ins. Co.*, 71 F.3d 1299, 1303 (7th Cir. 1995); *S.A. Healy Co. v. Milwaukee Metropolitan Sewer-*

age District, 50 F.3d 476, 479 (7th Cir. 1995); *In re Kazmierczak*, 24 F.3d 1020, 1022 (7th Cir. 1994). This principle was applied to a claim for contribution to the costs of cleaning up a toxic-waste site in *AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp.*, 104 F.3d 601, 606-08 (3d Cir. 1997). Generally the contract price is roughly equivalent to the value of the contractual performance (here the sale of the property). An enormous disparity between price and value is a clue that something may be amiss; and one possibility is that the performance has been misdescribed. But a chemical plant is not a fungible product; nor is a disclaimer of environmental liabilities. It would be impossible as a practical matter to infer what the price would be with a disclaimer of environmental liabilities from estimates of the "normal" price of a plant of this sort (and would that be with or without environmental liabilities?) and of the "normal" cost of being fully liable under CERCLA and the other environmental statutes. The evidence that PMC wanted to present on these matters would have led the district court on a wild goose chase.

The doctrine of extrinsic ambiguity is an exception to the rule that contracts clear on their face will be enforced as written. It should be interpreted narrowly lest it swallow the rule and make written contracts mere scraps of paper. Unless the evidence sought to be introduced not only is objective but would if believed make a compelling case that the contract means other than what it seems to mean, it should be kept out.

We conclude that the contract did not extinguish PMC's statutory rights against Sherwin-Williams, and let us consider now what they are. For PMC argues not that the contract requires Sherwin-Williams to indemnify PMC for any clean-up costs that it is forced to incur, but only that the contract does not require PMC to indemnify Sherwin-Williams for clean-up costs or waive PMC's statutory rights against Sherwin-Williams.

Although both parties are, as we said, strictly liable for the costs of cleaning up the toxic wastes at the site, CERCLA permits one of the "responsible parties" (as liable parties are called under CERCIA) to sue the other (or others) for reimbursement of

the costs of clean up that have been or will be borne by the plaintiff. 42 U.S.C. § 9607(a)(4)(B). In a suit of this sort between responsible parties, section 113(f)(1), 42 U.S.C. § 9613(f)(1), authorizes the district court to order "contribution" based on the balance of the equities. So if in a case between two responsible parties, party A had incurred 50 percent of the clean-up costs but was adjudged by the district court only one-fourth as culpable as B (maybe because A had dumped only one-fourth as much toxic waste), B would be ordered to pay A 60 percent of A's costs. Sixty percent of A's costs is 30 percent of the total costs. Adding that to the 50 percent of the total costs incurred by B yields 80 percent of the total costs—B's adjudged share on the assumption that it is four times as culpable as A, since 80 percent plus one-fourth of 80 percent (20 percent) equals 100 percent.

The district judge decided to make Sherwin-Williams not 80 or 90 or 95 but 100 percent responsible for the costs of cleaning up the site. This would be an unexceptionable decision if all the pollution had occurred before PMC took over the property. But PMC concedes that between the purchase in 1985 and the bringing of this suit in 1993 it dumped toxic wastes at the site on a number of occasions. Sherwin-Williams argues that in light of this concession, the district judge abused his equitable discretion (*AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp., supra*, 104 F.3d at 608; *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 573 (6th Cir. 1991)) in ruling that none of the clean-up costs should be borne by PMC. But the conclusion doesn't follow from the premise. PMC's spills may have been too inconsequential to affect the cost of cleaning up significantly, and in that event a zero allocation to PMC would be appropriate. *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992); cf. *AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp., supra*, 104 F.3d at 609. That was the district judge's judgment, and we cannot say that it was unreasonable. Granted, it might seem an invitation to purchasers of polluted sites to do a little polluting deliberately, in the hope of not having to pay anything to clean it up. But in the first place this is a risky strategy, since it might induce the judge to exercise his equitable discretion against the

wise guy; and in the second place the deliberate disposal of wastes without a permit is forbidden by RCRA. 42 U.S.C. § 6928(d)(2).

There is an issue of prematurity concerning the allocation of the clean-up costs that PMC has not yet incurred. *United States v. Hardage*, 982 F.2d 1436, 1445 (10th Cir. 1992), holds, however, that such an allocation is proper. It economizes on judicial time, in much the same way that awarding damages for both past and future losses economizes on judicial time in a tort case, and it also lets the parties know at the earliest opportunity where they stand. It is true that their cooperativeness in doing the actual clean-up is a relevant equitable factor that cannot be evaluated until the clean up is complete. *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co., supra*, 14 F.3d at 326 n. 4; *Environmental Transportation Systems, Inc. v. Ensco, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992). But this concern can be accommodated, as *Hardage* suggests, by allowing the district court to make an all-at-once determination subject to the court's revisiting the issue should a failure of cooperation or some other unforeseen circumstance make adherence to the original determination inequitable. See 982 F.2d at 1445.

There is another and more serious roadblock to the award of contribution to PMC under section 113(f)(1). The right created by that section does not arise automatically from a finding that a responsible party has paid more than its fair share of clean-up costs, as PMC was found to have done. The party must also show that it incurred these costs in compliance with the federal EPA's "national contingency plan." 42 U.S.C. § 9607(a)(4)(B); *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 59 F.3d 793, 800, 805 (9th Cir. 1995); *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512-15 (10th Cir. 1991) (per curiam). The plan requires that the proposed clean-up method in which the costs will be incurred be submitted for public comment before it is implemented. *Id.* at 1514; 40 C.F.R. § 300.700(c)(6). (The purpose, we take it, is to make sure that the remedial measures undertaken hopefully at the expense of someone else are not excessive or otherwise improvi-

dent.) PMC failed to do this and as a result the district judge held that it could not obtain any contribution under section 113(f)(1) for the clean-up costs that it has already incurred. *Washington State Dept. of Transportation v. Washington Natural Gas Co., supra*, 59 F.3d at 802-05; *County Line Investment Co. v. Tinney, supra*, 933 F.2d at 1512-15. PMC accepts this ruling. The ruling does not affect either site-assessment costs, which are not subject to the requirement of submission for public comment, or future costs. As to the latter, the requirement of public comment may be moot because Sherwin-Williams has been ordered to do the actual cleaning up and so it is presumably Sherwin-Williams that will be required to submit proposed measures for public comment. But the order, as we'll see later, was made under a statutory provision that is limited to pollution that is causing an imminent danger. There may be other pollution that PMC will be ordered to clean up, so it does have an interest, though only a contingent one, in obtaining an order requiring Sherwin-Williams to reimburse it for any future clean-up costs that it may incur.

For completeness we should note that the district judge awarded site-assessment costs to PMC not only under section 113(f) but also under section 107(a), which authorizes suits for damages against owners of contaminated sites by persons who incur costs in cleaning up the sites. 42 U.S.C. § 9607(a)(4)(B). It is this provision, which creates strict liability, that imposed on PMC a legal duty to clean up the property that it had bought from Sherwin-Williams. In recognition that CERCLA liability is strict, Congress created an "innocent landowner" defense not here invoked, 42 U.S.C. §§ 9601(35), 9607(b)(3), plus the contribution provision of section 113(f). Two of our decisions hold that an innocent landowner can also sue under section 107(a). *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240-41 (7th Cir. 1997); *AM Int'l, Inc. v. Datacard Corp., supra*, 106 F.3d at 1347; see also *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *New Castle County v. Halliburton Nus Corp.*, 111 F.3d 1116, 1123 n. 7 (3d Cir. 1997). Since PMC did spill some toxic wastes on the property, it may not be entitled to any relief

under that section, but we need not decide this since the only relief it is seeking under it we have affirmed under section 113(f).

As far as the already incurred costs (other than the site-assessment costs), which PMC can't obtain contribution for under any provision of CERCLA, are concerned, PMC has another string to its bow—the Illinois Contribution Act. This is a general statute governing contribution among joint tortfeasors, not anything designed for environmental cases, and so naturally it contains no public-comment requirement. Since the dumping of toxic wastes—the tort—occurred in Illinois, we may assume as the parties do that the Act is applicable despite the choice of law provision in their contract, a provision presumably limited to contract disputes.

The district judge allowed PMC to obtain under the Illinois statute the contribution for past costs incurred that it also but unsuccessfully sought under CERCLA. Sherwin-Williams argues that this award improperly circumvents CERCLA's limitation on contribution. PMC replies by pointing to CERCLA's broad savings clause, which provides that nothing in CERCLA "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Despite this clause, one court has held that section 113(f)(1) provides the exclusive means of obtaining contribution by one responsible party from another. *In re Reading Co., supra*, 115 F.3d at 1117.

The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law. *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 n. 8 (9th Cir. 1995) (per curiam); *Cropwell Leasing Co. v. NMS, Inc.*, 5 F.3d 899, 901 (5th Cir. 1993) (per curiam); *United States v. Colorado*, 990 F.2d 1565, 1575-76 (10th Cir. 1993); *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991). PMC, even if it does have rights under the broadly worded section 107(a), is not a victim of toxic-wastes contamination in any realistic sense. It bought the property from

Sherwin-Williams knowing there were toxic wastes there, and by buying it became a responsible party strictly liable for the consequences of those wastes. That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort; it is merely the less guilty of two tortfeasors.

Common law courts traditionally did not consider the claim of one joint tortfeasor for a sharing of the costs of liability by the other one worthy of *any* judicial time and attention, except in cases in which the second tortfeasor had agreed (or was treated as having agreed) to indemnify the first. *Union Stockyards Co. v. Chicago, Burlington & Quincy Ry.*, 196 U.S. 217, 224 (1905); *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880, 885 (7th Cir. 1993); *Skinner v. Reed-Prentice Division Package Machinery Co.*, 374 N.E.2d 437, 440-41 (Ill. 1978). Statutes such as section 113(f)(1) of CERCLA and the Illinois contribution act have modified the common law. But CERCLA limits the right of contribution by the requirement in section 107(a)(4)(B) of consistency with the national contingency plan. When the requirement is flouted, contribution is denied; that is the sanction for the violation. PMC's invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed.

A savings clause is not intended to allow specific provisions of the statute that contains it to be nullified. *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1965 (1998); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-99 (1976); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998). CERCLA's savings clause must not be used to gut provisions of CERCLA. The purpose of a savings clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute. *Atherton v. FDIC*, 117 S. Ct. 666, 674-75 (1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 (1982). The legislature doesn't want to wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it

was enacted. The passage of federal environmental laws was not intended to wipe out the common law of nuisance. Cf. *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 288-89 (7th Cir. 1997).

Let us turn to the RCRA injunction that PMC obtained. Sherwin-Williams argues that a RCRA tail should not be allowed to wag a CERCLA dog. Since, as we have pointed out, PMC is not a victim of pollution, it may indeed seem odd to allow it to obtain relief under a pollution-control statute. But no odder than allowing it to obtain relief in the form of contribution under another pollution-control statute, namely CERCLA. In any event, we rejected this argument in *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1349 (7th Cir. 1997). PMC is therefore entitled to relief against Sherwin-Williams if it can show that the pollution caused by the latter's occupancy of the property creates an imminent danger to human health or the environment. 42 U.S.C. § 6972(a)(1)(B); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-86 (1996). The evidence was conflicting, but there was enough to require us to uphold the district judge's finding. Sherwin-Williams points out that the toxic wastes are buried; but the buried wastes contain lead that is a constant danger to the groundwater, so that some cleaning up is necessary in the interest of health, which is what the statute requires. Compare *Price v. United States Navy*, 39 F.3d 1011, 1019-21 (9th Cir. 1994).

We are mindful that a citizen's (that is, that PMC's) suit under RCRA is barred if the state at the time of suit "has commenced and is diligently prosecuting an action" in a federal or state court under the statute to clean up the site. 42 U.S.C. § 6972(b)(2)(C); see § 6972(a)(1)(B). When PMC sued, Illinois had already taken certain administrative actions to bring about PMC's compliance with RCRA, but had not filed a lawsuit. Preliminary and informal in character, these were not "actions" in the legal sense in which the statute appears to be using the term, that is, formal proceedings whether in a court or before an agency. Writing a letter would hardly be described as "commencing" or "prosecuting" an "action." Although a broad reading of "actions" would be consistent with Congress's evident desire that citizens' suits supplement rather than displace state

enforcement, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60-61 (1987); *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995), we do not consider the argument strong enough to override the statutory text, cf. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524-25 (9th Cir. 1987); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61-63 (2d Cir. 1985), especially when we consider the interminable character of much administrative process and the difficulty of deciding on a threshold below which the process is too tentative to justify barring a citizen's suit. Cf. *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979). Suppose Illinois' environmental protection agency sent a letter of inquiry to PMC with no follow-up. Would that administrative "action" bar PMC from suing? If not, what would? How "diligent" would the agency have to be in pursuing the matter? We'd rather not get into those questions, and we don't think that Congress intended us to.

Sherwin-Williams argues in the alternative that the district court should have abstained in favor of the state administrative proceeding. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361-62 (1989); *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 708-09 (7th Ch. 1991), or, what amounts to the same thing, should have applied the doctrine of primary jurisdiction, which gives an agency the first and often the last crack at resolving issues within its domain. See, e.g., *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *United States v. Western Pacific Ry.*, 352 U.S. 59, 65 (1956); *Cahnmann v. Sprint Corp., supra*, 133 F.3d at 487; *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). That would be an end run around RCRA. Congress has *specified* the conditions under which the pendency of other proceedings bars suit under RCRA and, as we have just seen, those conditions have not been satisfied here. Bearing in mind that the statute has reference only to formal proceedings in federal or state court, see 42 U.S.C. §§ 6972(a)(1)(B), (b)(2)(C), there may be room for applying the doctrines of abstention or primary jurisdiction (different labels for the same thing, in this context) in cases in which a state has a formal administrative

proceeding in progress that the citizens' suit would disrupt, as in *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188 (6th Cir. 1995)—especially since the plaintiff there was challenging the lawfulness of the state regulatory scheme. There is nothing like that here. The state proceedings (if they can even be called that) are informal, as we have said, and the citizens' suit merely concerns the allocation of clean-up responsibilities among responsible parties.

Only two other issues need to be discussed. The first is the *form* of the RCRA injunction that the district court issued. It reads in its entirety as follows: "This Court therefore orders Sherwin-Williams to take full responsibility for the future remediation of the PMC facility." This form of words fails to comply with the requirements of Fed. R. Civ. P. 65 that an injunction be precise and self-contained, so that a person subject to it who reads it and nothing else has a sufficiently clear and exact knowledge of the duties it imposes on him that if he violates it he can be adjudged guilty of criminal contempt. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam); *Board of Education v. Illinois State Board of Education*, 79 F.3d 654, 657 (7th Cir. 1996); *United States v. Board of Education*, 11 F.3d 668, 672 (7th Cir. 1993). The "injunction" falls far short of that standard. The concept of taking "'full responsibility" is hopelessly vague. It cannot sensibly be construed literally, for that would imply that if tomorrow PMC blankets the site with radioactive nuclear wastes Sherwin-Williams will have to bear the entire cost of cleaning it up. More generally, the "injunction" fails to confine Sherwin-Williams's obligation to cleaning up the pollution for which it, not PMC, is responsible. The case will have to be remanded for the redrafting of the injunction.

Last, the explanation that the judge gave for exercising his discretion in favor of an award of attorney's fees to PMC for obtaining the injunction was inadequate. He announced a conclusion, but gave no reasons for it, as we require. *AM Int'l, Inc. v. Datacard Corp., supra*, 106 F.3d at 1352. "Legal rules committing decisions to judicial discretion suppose that the court will have, *and give,* sound reasons for proceeding one way rather than

the other." *York Center Park District v. Krilich,* 40 F.3d 205, 209 (7th Cir. 1994) (emphasis added); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Ford v. Neese*, 119 F.3d 560, 563 (7th Cir. 1997).

To summarize, the judgment of the district court is affirmed with three exceptions: the part of the judgment awarding contribution to PMC for costs already incurred by it in cleaning up the property is vacated with directions to dismiss this claim; the injunction is vacated and the case remanded for the entry of an injunction that will comply with Rule 65; and the award of attorney's fees is vacated, to be recomputed on remand. There will be no award of costs in this court.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PMC, INC., a Delaware corporation,	)	
Plaintiff,	)	
v.	)	**No. 93 C 1379**
	)	**Paul E. Plunkett, Judge**
THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter is now before the Court for a decision on the merits on the plaintiff's environmental liability claims in Counts I through IV and Count XII following a bench trial.[1/] The following Findings of Fact and Conclusions of Law are entered pursuant to Federal Rule of Civil Procedure 52(a), after having examined the entire record and after having determined the credibility of the witnesses.

FINDINGS OF FACT[2/]

I. The Site

1. The Sherwin-Williams Company ("Sherwin-Williams") is an Ohio corporation doing business in Illinois and

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[1/]The plaintiff's state law claims remain to be tried to a jury.

[2/]The following findings of fact have been compiled by the Court, consistent with its own findings, from the parties' stipulated and proposed findings of fact and from other evidence submitted to the Court.

is a "person" under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6900 et seq., and the Illinois Contribution Among Joint Tortfeasors Act ("Illinois Contribution Act"), 740 ILCS 100/1 et seq.

2. PMC, Inc. ("PMC") is a Delaware corporation doing business in Illinois and is a "person" under CERCLA, RCRA and the Illinois Contribution Act.

3. The Historic Sherwin-Williams Chicago Plant Site (the "Historic Sherwin-Williams Site") is all properties historically owned by Sherwin-Williams at or adjacent to 11541 South Champlain Avenue, Chicago, Illinois prior to July 1, 1985. This area is bounded by Doty Avenue on the east, 115th Street on the north, Cottage Grove Avenue on the west and 119th Street on the south. The Historic Sherwin-Williams Site was approximately 132 acres in size.

4. The Current Sherwin-Williams Chicago Site (the "Current Sherwin-Williams Site") is that portion of the Historic Sherwin-Williams Site still owned by Sherwin Williams after the sale of its Chemical Division to PMC in 1985. This area is generally bounded by the PMC facility on the east, 115th Street on the north, Cottage Grove Avenue on the west and 119th Street on the south. It is approximately 100 acres in size.

5. There is a residential and business neighborhood approximately a block or two to the north (across 115th Street) from the Current Sherwin-Williams Site. (Tr. Trans. at 543.)

6. The PMC facility (the "PMC Facility") is that portion of the Historic Sherwin-Williams Site purchased by PMC as part of its purchase of Sherwin-Williams' Chemical Division in 1985. This area is generally bounded by Doty Avenue on the east, 115th Street on the north, the Current Sherwin-Williams Site on the west, and that portion of the Current Sherwin-Williams Site commonly known as the "Back 40" on the south.

This area is approximately 32 acres in size. It is a "facility" under CERCLA.

7. The groundwater at the PMC Facility does not flow into any source of drinking water.

II. The Sale

8. Sherwin-Williams decided in 1983 to sell its Chemicals Division, including that portion of the Historic Sherwin-Williams Site on which the Chemicals Division operated.

9. Sherwin-Williams and PMC entered into a Purchase and Sale Agreement (the "Purchase Agreement") on May 31, 1985, in which PMC purchased among other things the Chemicals Division portion of the Historic Sherwin-Williams Site. That portion is now the PMC Facility. The sale closed on June 30, 1985.

10. Sherwin-Williams continues to own and operate the Current Sherwin-Williams Site.

III. The Hazardous Substances

11. From at least 1888 until May 31, 1985, Sherwin-Williams owned and operated the Historic Sherwin-Williams Site. At various times, it manufactured paints, paint pigments (including white lead), resins, varnishes, dry colors, Azo dyes, lacquers, fuchsine, alkali blue, phthalic anhydride, phthalocyanine blue, tobias acid, insecticides (including Paris Green, DDT, 2,4-D, and 2,4,5-T), para-cresol, dinitroparacresol, mononitroparacresol and isophthalonitrile there. It also used and/or stored the following chemicals there, all of which are hazardous substances under CERCLA as set forth at 40 C.F.R. § 302.4:

lead	ortho-dichlorobenzene	n-butyl alcohol
arsenic	para-dichlorobenzene	methyl methacrylate
chromium	methyl isobutyl ketone	styrene
cadmium	ethyl acrylate	para-cresol
barium	dibutyl phthalate	ortho-cresol
copper	xylenes (mixed isomers)	ethyl benzene
zinc	methanol	xylene
antimony	glycol ethers	ammonia
cobalt	cumene	acetone
nickel	acrylic acid	toluene
naphthalene	butyl acid	
phthalic anhydride	acrylamide	
maleic anhydride	ethylene glycol	

12. Historical evidence in the form of insurance maps and aerial photographs show that from 1897 until the mid-1960s portions of the Historic Sherwin-Williams Site bordered Lake Calumet and that the lake area of the Historic Sherwin-Williams Site was completely filled in by 1967. This was accomplished at least in part by Sherwin-Williams' on-site disposal of industrial wastes containing hazardous substances.

13. From 1988 until the 1950s, disposal of waste at the Historic Sherwin-Williams Site was accomplished by on-site burning and land filling. Waste materials were hauled from the operating facilities and discarded on the vacant land at the Historic Sherwin-Williams Site. Burnable materials were disposed of by controlled burning. Remaining residues and non-burnable wastes were dumped into the low wetlands bordering Lake Calumet at the Historic Sherwin-Williams Site as a means of filling in the lake. Controlled burning was stopped in the 1950s. However, the practice of land filling waste materials continued until the mid-1960s.

14. Sherwin-Williams also buried drums of material and/or waste containing hazardous substances at the Historic Sherwin-Williams Site, including in a 40-acre area now known as the "Back 40" on the Current Sherwin-Williams Site. The Back 40 is directly south of the PMC Facility.

15. The vast majority of the area that now comprises the PMC Facility was created by filling in Lake Calumet.

16. Organic and inorganic chemicals have been detected in soil and groundwater at the PMC Facility at concentrations exceeding applicable clean-up objectives.

17. On or about June 2, 1981 Sherwin-Williams filed with the United States Environmental Protection Agency ("USEPA") a Notification of Hazardous Waste Site under Section 103© of CERCLA ("103© Notice"), in which it stated that there were drums buried at the Historic Sherwin-Williams Site, releases of wastes to the environment were "likely," and that "manufacturing residue [was] dumped in the low-lying areas south of Kensington Avenue.'"

18. During its ownership of the Historic Sherwin-Williams Site up until 1983, Sherwin-Williams had soil borings taken there that indicated the presence of "industrial plant waste" and chemical odors in the sub-surface soil at or adjacent to what is now the PMC Facility. A 1980 soil boring report indicated that fill materials had a "strong chemical odor" and that "possibly a chemical waste appears over most of the site area."

19. Lead, arsenic and other metals found in the soil and groundwater at the PMC Facility at concentrations exceeding applicable clean-up objectives are not used by PMC as raw materials or produced by PMC from any of its processes at the PMC Facility. Those hazardous substances are highly toxic. They are present at the PMC Facility solely as the result of Sherwin-Williams' historic production and disposal activities during its ownership of the Historic Sherwin-Williams site. The contamination by those hazardous substances extends throughout the PMC Facility, and remediation of those substances will require remediation of the entire site.

20. The organic compounds found in the soil and/or groundwater at the PMC Facility either exclusively or virtually exclusively result from Sherwin-Williams' historic production

and disposal activities during its ownership of the Historic Sherwin-Williams Site.

21. There has been a release or threat of a release of hazardous substances in the form of metals and organic compounds disposed of by Sherwin-Williams into the soil and/or groundwater at the PMC Facility that requires further investigation and remediation.

22. During its ownership and operation of the PMC Facility, PMC (through divisions or subsidiaries) has at various times manufactured alkali blue, para-cresol, dinitroparacresol, mononitroparacresol and isophthalonitrile. In addition, the following chemicals and/or hazardous substances have been spilled onto the soil and/or groundwater or have leaked or spilled into the Facility's sewer system:

cresol	sodium hydroxide
toluene	meta-xylene
sulfuric acid	E-benzene
sodium toluene	nitric acid
aniline	ethyl benzene
hydrochloric acid	TSA

23. PMC's operations at the PMC Facility, including the spills and leaks, have either not contributed to the contamination by organic compounds in the soil and/or groundwater there or have contributed only negligible amounts to the preexisting contamination by organic compounds caused by Sherwin-Williams.

24. The contamination by organic compounds in the soil and/or groundwater at the PMC Facility occurs only in isolated and localized areas of the site. Remediation of those contaminated areas alone would not require remediation of the entire PMC Facility.

25. The presence of leachable lead and other metals will drive the remediation of the entire PMC Facility.

IV. Past Clean-Up Activities

26. In October 1987 while excavating a sewer line at the PMC Facility, PMC employees excavated discolored soil contaminated with chromium ("Occurrence #1"). That soil was disposed of at a cost of $43,479.23.

27. In April 1989 while replacing a collapsed sewer line running across Kensington Avenue at the PMC Facility, PMC employees again excavated discolored soil contaminated with chromium ("Occurrence #2"). That soil was disposed of at a cost of $35,228.63.

28. From May through August 1990 while making sewer repairs and installing an air stripper near Building 650 at the PMC Facility, PMC employees excavated discolored soil contaminated with cadmium and lead ("Occurrence #3"). That soil was disposed of at a cost of $84,387.47.

29. PMC and Sherwin-Williams have reached a settlement regarding the costs of Occurrences #1-3.

30. In April 1992 while making sewer repairs south of Building 650 at the PMC Facility, PMC employees excavated a large amount of soil that was contaminated with lead, cadmium and ortho-dichlorobenzene ("Occurrence #4"). PMC disposed of the soil as a hazardous waste by removing it to a CID landfill. The soil's initial characterization as hazardous waste was done by PMC. After at least part of the soil had been land filled, the Illinois Environmental Protection Agency ("IEPA") required PMC and CID/Waste Management, the disposal company, to recharacterize the soil as a U-code hazardous waste because of the presence of ortho-dichlorobenzene. As a result, the IEPA required PMC and CID/Waste Management to exhume the land filled soil and to dispose of all the soil by incineration. The total cost of disposing of that soil was $741,609.48.

31. During discussions with the IEPA before the contaminated soil was removed from the PMC Facility, PMC requested permission from the IEPA to return at least some of the

soil to the excavation site. The IEPA refused to allow PMC to do so unless the soil was first treated so as to be uncontaminated.

32. PMC informed Sherwin-Williams of Occurrence #4, requesting its participation in the disposal of the contaminated soil and the associated costs. Sherwin-Williams' only response was to recommend that PMC return the soil to the excavation site.

33. Sherwin-Williams' past operations and disposal practices were the sole source of the lead, cadmium and ortho-dichlorobenzene found in the soil excavated during Occurrence #4.

34. In April 1992 while repairing a water line break near the southwest corner of Building 865 at the PMC Facility, PMC employees excavated soil contaminated with ortho-dichlorobenzene and 1,2,4-trichlorobenzene ("Occurrence #5"). That soil was disposed of as hazardous waste at a cost of $16,222.80.

35. Sherwin-Williams' past operations and disposal practices were the sole source of the ortho-dichlorobenzene found in the soil excavated during Occurrence #5. Because there was no evidence that either PMC or Sherwin-Williams used or produced the 1,2,4-trichlorobenzene, the source of that hazardous substance is not clear. The presence of the ortho-dichlorobenzene alone required that the soil be disposed of as a hazardous waste.

36. In October 1992 while repairing a water line near the northwest comer of Building 865 at the PMC Facility, PMC employees excavated discolored soil contaminated with naphthalene and ortho-dichlorobenzene ("Occurrence #6"). That soil was disposed of as hazardous waste at a cost of $12,913.33.

37. Sherwin-Williams' past operations and disposal practices were the sole source of the naphthalene and ortho-dichlorobenzene found in the soil excavated during Occurrence #6.

38. In February 1994 while constructing a nitrogen generation system south of Building 865 at the PMC Facility, PMC employees excavated discolored soils contaminated with naphthalene and ortho-dichlorobenzene ("Occurrence #7"). That soil was disposed of as hazardous waste at a cost of $27,856.00.

39. Sherwin-Williams' past operations and disposal practices were the sole source of the naphthalene and ortho-dichlorobenzene found in the soil excavated during Occurrence #7.

40. In May 1994 while repairing water lines near Building 865 at the PMC Facility, PMC employees excavated discolored soils contaminated with naphthalene and toluene ("Occurrence #8"). That soil was disposed of as hazardous waste at a cost of $1,490.75.

41. Sherwin-Williams' past operations and disposal practices were the sole source of the naphthalene found in the soil excavated during Occurrence #8. Although both PMC and Sherwin-Williams used toluene in their operations at the PMC Facility, PMC has not used it at the location of Occurrence #8. Therefore Sherwin-Williams' past operations and disposal practices were also the source of the toluene found in the soil excavated during Occurrence #8.

42. Sherwin-Williams has refused to reimburse PMC for any of the costs associated with Occurrences #4-8.

43. In connection with Occurrences #4-8, PMC did not provide an opportunity for public comment concerning the selection of the response action, designate a spokesperson, publish a notice in a local newspaper of availability of the administrative record file or provide for a public comment period. It also did not conduct interviews with local officials, community residents, or other interested parties, prepare a community relations plan, establish a local information repository or schedule public meetings. (See Tr. Trans. at 543-45.)

44. In connection with Occurrences #4-8, PMC did notify Sherwin-Williams and PMC's employees of its response actions. (Id. at 485.)

45. On December 8, 1992 the IEPA issued a notice to PMC pursuant to Section 4(q) of the Illinois Environmental Protection Act (the "4(q) Notice"). The Notice stated that "the release of hazardous substances at, from or attributable to the [PMC Facility] and the continuing threat of release at the PMC Facility present an immediate and significant risk of harm to human health, welfare and the environment" and that "the actions required by this Notice are necessary to protect human health, welfare, and the environment." Pursuant to the 4(q) Notice, the IEPA ordered PMC to investigate whether a release of hazardous substances occurred at the PMC Facility, to complete appropriate response actions and to reimburse the IEPA for response and oversight costs.

46. In response to the 4(q) Notice PMC submitted to the IEPA a remedial investigation work plan prepared by McLaren-Hart and conducted an IEPA-approved sampling of the soil and groundwater at the PMC Facility at a cost of $635,711.19 ("Occurrence #9"). Sherwin-Williams has refused to reimburse PMC for any of the costs related to Occurrence #9.

47. Sherwin-Williams has stipulated that PMC's costs associated with Occurrence #9 were reasonable and necessary and that PMC performed all actions necessary to comply substantially with the applicable requirements of the 1990 National Contingency Plan (the "NCP").

48. Pursuant to the 4(q) Notice the IEPA has requested that PMC conduct additional investigation at the PMC Facility and will require PMC to engage in a remediation of the PMC Facility.

49. PMC gave Sherwin-Williams written notice of its intent to sue under RCRA on August 3, 1992, more than 60 days prior to the filing of this action.

Conclusions of Law

I. Liability Under Section 107(a) of CERCLA (Count I)

In its Memorandum Opinion and Order of September 23, 1996 (the "Opinion," 1996 WL 546869), this Court determined that Sherwin-Williams was liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607. Despite that conclusion, Sherwin-Williams is liable for PMC's response costs only if those costs were necessary and consistent with the NCP, for Section 107(a)(4)(B) places those two limitations upon a party's recovery of its response costs from otherwise liable third parties. 42 U.S.C. §9607(a)(4)(B). The plaintiff bears the burden of proof on this issue. G.J. Leasing Co. v. Union Elec. Co., 854 F. Supp. 539, 561 (S.D. Ill. 1994), affd, 54 F.3d 379 (7th Cir. 1995) (plaintiff must "prove affirmatively that its response costs were both necessary and consistent with the NCP in order to recover under CERCLA."). The relevant NCP is the one in effect at the time the response costs were incurred. Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565, 1576 (9th Cir. 1994), cert. denied, 115 S. Ct. 780 (1995).

In this action, PMC seeks to recover its response costs for Occurrences #1-9. However, Sherwin-Williams has already reimbursed PMC for Occurrences #l-3, and it has stipulated that Occurrence #9 was necessary and consistent with the NCP. Therefore, the only issue is whether Occurrences #4-8 were necessary and consistent with the NCP. Those occurrences took place from 1992 to 1994, and the 1990 NCP was in effect during each of those response actions. See Alcan-Toyo America, Inc. v. Northern Ill. Gas Co., 904 F. Supp. 833, 835 (N.D. Ill. 1995).

A. Necessary Costs

To establish that its response costs were "necessary" under Section 107(a), a plaintiff must show that:

(1) the costs were incurred in response to a threat to human health or the environment, and

(2) the costs were necessary to address that threat.

G.J. Leasing, 854 F. Supp. at 562. It is undisputed that in each of Occurrences #4-8, PMC tested the excavated soil and found that it contained concentrations of hazardous substances above permissible levels. The presence of such substances in piles of excavated soil at the PMC Facility where (at a minimum) PMC's employees could come into contact with it is sufficient to demonstrate the existence of a threat to human health or the environment. That conclusion is bolstered by the fact that in the 4(q) Notice issued in December 1992 the IEPA found "an immediate and significant risk of harm to human health, welfare and the environment." Because the contamination found in the excavated soil in Occurrences #4-8 resulted from Sherwin-Williams' pre-1985 operations at the site, the risk identified in the 4(q) Notice was already present in early 1992 when PMC took its response actions as to Occurrences #4-6. And because the site had not been remediated by 1994, that risk was still present when PMC undertook the response actions as to Occurrences #7-8.

As to the necessity of the costs incurred, PMC has submitted evidence that it disposed of the excavated soil in each occurrence as hazardous waste. In only one instance, Occurrence #4, has Sherwin-Williams challenged the handling of that disposal. PMC's evidence shows that in Occurrence #4 the IEPA refused to permit PMC to return the excavated soil to the ground unless that soil had first been treated. In addition, the IEPA not only required that the soil be disposed of as hazardous waste but also found that it contained a hazardous substance that had to be disposed of by incineration rather than land filling, thereby requiring the exhumation of the land filled material. Although Sherwin-Williams contends that PMC's error in characterizing the soil led to the costly exhumation process (Contested Facts ¶ 48), its own expert testified at trial that he thought the IEPA's characterization of the soil was confusing and that PMC should have sought a variance. (Tr. Trans. at 883-84.) That testimony demonstrates that the characterization of the waste was a matter of judgment, not a ministerial act that PMC performed negligently, as Sherwin-Williams' argument suggests. Viewing all of this evidence, we conclude that despite PMC's decision not to re-

turn the excavated soil to the ground and its erroneous characterization of the soil for disposal, its costs as to Occurrence #4 were necessary.

Sherwin-Williams also asserts that the response costs associated with Occurrences #4-8 were actually the costs of capital improvements to the PMC Facility. (Contested Facts ¶ 46.) That assertion is not supported by the evidence, which shows that PMC seeks recovery only of its costs of disposing of the contaminated soil. While PMC excavated the soil in question in the process of making capital improvements or repairs, Sherwin-Williams has offered no evidence that PMC has improperly included the costs of the capital improvements in the amounts it seeks to recover.

Finally, Sherwin-Williams asserts that the disposal of the contaminated soil in Occurrences #4-8 was unnecessary because the entire site will have to be remediated, so that PMC should simply have returned the contaminated soil to the ground and left it there until the site-wide remediation could be completed. That argument ignores the evidence as to Occurrence #4 that the IEPA refused to permit PMC to return the contaminated soil to the ground unless it had first been treated. We may infer from the IEPA's position regarding Occurrence #4 that it would have taken the same position as to Occurrences #5-8, for there is no evidence suggesting that the IEPA's responses to the later occurrences would have been any different. As a result, returning the contaminated soil to the ground was simply not a viable option for PMC.

In sum, the evidence shows that PMC's costs associated with Occurrences #4-8 were incurred in response to a threat to human health or the environment and that the costs were necessary to respond to that threat. As such, the response costs were "necessary" within the meaning of Section 107(a)(4)(B) of CERCLA.

B. Consistent with the NCP

A party seeking to recover response costs under Section 107(a) must also show that its response actions were consistent with the NCP. 42 U.S.C. § 9607(a)(4)(B). The 1990 NCP requires only "substantial compliance" with its terms. 40 C.F.R. § 300.700(c)(3)(I). "Immaterial" or "insubstantial" deviations from the NCP will not render a response action inconsistent with it. 40 C.F.R. § 300.700(c)(4).

Both CERCLA and the NCP classify response actions as either "removal" or "remedial" actions. 42 U.S.C. § 9601(23) (removal) & § 9601(24) (remedial); 40 C.F.R. § 300.5 (removal & remedial). PMC argues that Occurrences #4-8 are removal actions only, while Sherwin-Williams asserts that they were remedial. The distinction can be important in determining consistency with the NCP because certain of its requirements, such as the public notice requirement, are more stringent for remedial actions than for removal actions. Regardless of the classification of the response action, however, the minimum standard remains "substantial compliance."

The 1990 NCP provides that "private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action ..." 40 C.F.R. § 300.700(c)(6). For removal actions, the 1990 NCP requires the designation of a "spokesperson" to "inform the community of actions taken, respond to inquiries, and provide information concerning the release." 40 C.F.R. § 300.415(n)(l).[3/]

[3/]Although that provision speaks of the "lead agency's" obligation to appoint a spokesperson, a private party performing a response action may be expected to fulfill that obligation. See 40 C.F.R § 300.700(c)(8)("any action taken by the lead agency listed in paragraphs (c)(5) through (c)(7) may be taken by the person carrying out the response action."); 55 Fed. Reg. 8795 (March 8, 1990) ("In a private party response action, the private party may perform most of the function of a lead agency. . .; there is no support agency in a private party cleanup action.")

The significance of the public notice requirements is made clear by the preamble to the plan:

> Public participation is an important component of a CERCLA-quality cleanup, and of consistency with the NCP. The public — both PRP's [potentially responsible parties] and concerned citizens — have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups — which are performed without governmental supervision — are carried out in an environmentally sound manner. Thus, EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA.

55 Fed. Reg. at 8795.

Neither the Seventh Circuit nor the other courts of appeals has spoken on the issue of whether compliance with the public notice requirements of the 1990 NCP is material, but the majority of district courts to consider the issue have concluded that it is. In Alcan-Toyo America, Inc. v. Northern Ill. Gas Co., 904 F. Supp. 833, 836 (N.D. Ill. 1995), the court reasoned:

> Public comment is clearly required under 40 C.F.R. § 300.415(m) [addressing community relations requirements for removal actions]. This section, excluding a few inapplicable provisions, is listed as a requirement with which parties must substantially comply in order to recover their costs. See 40 C.F.R. § 300.700(c)(5)(vi). Under the provision rendering the section governing removal actions necessary for substantial compliance, therefore, the public comment requirement for removal actions is prescribed for cost recovery actions. The EPA, however, has created an additional separate section, explicitly reiterating the requirement that to be consistent with the NCP the party must seek public comment. The fact that the NCP lists the public comment requirement in two separate sub-

> sections of the requirements for consistency with the NCP indicates that a failure to fulfill the requirement is not an "immaterial or insubstantial deviation[]" from the NCP's requirements. 40 C.F.R. § 300.700(c)(4).

Id. at 836. See VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 690-93 (E.D. Wis. 1996) and cases cited there at 690. See also C&C Millwright Maint. Co. v. Town of Greenville, Tenn., 946 F. Supp. 555 (E.D. Tenn. 1996); Bethlehem Iron Works v. Lewis Indus., 1996 WL 557592, at *58-59 (E.D. Pa. Oct. 1, 1996).

We consider PMC's activities as to public notice and community relations before deciding whether Occurrences #4-8 were removal or remedial actions under the NCP because if PMC did not substantially comply with the public notice requirement, the classification of its response actions is a moot point. PMC asserts that it substantially complied because it notified its most immediate neighbor, Sherwin-Williams, of Occurrences #4-8 and invited its participation in the selection of remedial measures. That fact is undisputed. Sherwin-Williams' argument that PMC's motivation was not an invitation for public comment but rather a demand that Sherwin-Williams pay up does not require us to ignore such notification, for the NCP does not inquire into motives. As long as the communication occurred, it can be considered. The only other notification PMC provided was to its own employees. (Tr. Trans. at 485.)

The evidence showed that Sherwin-Williams is PMC's sole neighbor to the south and west, that the PMC Facility is bordered on the east by Doty Avenue and on the north by 115th Street, and that to the north there are no houses for some distance. (Id.) But on cross-examination Sherwin-Williams obtained testimony from one of PMC's witnesses that to the north across 115th Street from Sherwin-Williams there are businesses and apartments only a block or so down the street. (Id. at 543.) That evidence places a residential and business neighborhood at most a few blocks away from the PMC Facility. Sherwin-Williams also elicited the witness' testimony that PMC did not prepare a formal commu-

nity relations plan, did not publish a notice in any local newspaper and did not schedule any public meetings. (Id. at 544-45.)

PMC offered the testimony of one of its experts, Greg Vanderlaan ("Vanderlaan"), on the issue of the consistency of its response actions with the NCP. He testified that in his experience communities are frequently uninterested in response actions and that he was aware of no instance in which the community had objected to the removal of contaminated soil. (Id. at 686-87.) But consistency with the NCP, including whether a plaintiff has substantially complied with its public notice requirement, is a question of law. See generally Yellow Freight Sys., Inc. v. ACF Indus., Inc., 909 F. Supp. 1290, 1299 (E.D. Mo. 1995). Vanderlaan's testimony regarding his experience does not alter the NCP's legal requirement of public notice and community involvement. And, as one court has explained, "Community relations requirements are diminished, but not abolished, in a situation in which removal ... is required." C&C Millwright, 946 F. Supp. at 558.

A handful of courts have concluded that substantial compliance with the NCP existed even where the plaintiff failed to provide for public comment because a state regulatory agency was heavily involved in oversight and management of the response action. See, e.g., American Color & Chemical Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945 (D.S.C. 1995); General Elec. Co. v. Litton Bus. Sys., Inc., 715 F. Supp. 949 (W.D. Mo. 1989), aff'd, 920 F.2d 1415 (8th Cir. 1990). But PMC has not argued here that the IEPA's involvement satisfied PMC's obligation of community involvement. And even if it had, the level of the IEPA's involvement in Occurrences #4-8 was significantly lower than that of the state agencies in those cases. See VME Americas, 946 F. Supp. at 692 (discussing extensive state agency involvement present in General Elec. and American Color). We have uncovered no decision in which a court has found substantial compliance with the public comment requirement based upon actions similar to those of PMC here.

This Court recognizes that letting Sherwin-Williams off the hook on the basis of lack of public notice does not seem altogether fair to PMC. As the VME Americas court stated in reaching the same conclusion:

> [I]t seems a bit unfair for [the defendant], the likely source of the contamination, to escape much of the financial responsibility for cleaning it up. But that is what the law requires. Compliance with the NCP "is [not] reducible to an inquiry into whether the cleanup was cost-efficient and environmentally sound." Channel Master [Satellite Sys., Inc. v. JFD Electronics Corp., 748 F. Supp. 373, 384 (E.D. N.C. 1990)]. Congress chose instead to create a detailed regulatory scheme and decided to make "adherence to the regulatory scheme . . . more important than making CERCLA an unlimited vehicle for cleanup cost recovery. [Id. at 393.] In cases like this, the regulatory scheme may seem unduly scrupulous and inflexible, but this highlights the limited nature of the federal remedy . . . .

Id. at 692-93.

In sum, PMC is not entitled to recover its response costs associated with Occurrences #4-8 under Section 107(a) of CERCLA because its failure to provide for public comment renders its actions inconsistent with the 1990 NCP. Judgment is therefore entered in favor of Sherwin-Williams as to those occurrences on Count I. However, Sherwin-Williams has stipulated that Occurrence #9 was necessary and consistent with the NCP, so judgment is entered in favor of PMC as to it on Count I. Finally, PMC and Sherwin-Williams have settled as to Occurrences #1-3, and PMC's claims for those costs have been withdrawn.

II. Liability Under Section 113(f) of CERCLA (Count II)

In the Opinion, this Court also determined that PMC was entitled to seek contribution for response costs from Sherwin-

Williams under Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1). Once again, however, Sherwin-Williams is not liable under Section 113(f)(1) if this Court allocates all of the response costs to PMC. See 42 U.S.C. § 9613(f)(1). In deciding the proper allocation of response costs, we may consider "such equitable factors as the court determines are appropriate." See id. Although PMC seeks both its past response costs and a declaration that Sherwin-Williams is responsible for the future remediation of the site, our conclusion that Sherwin-Williams is not liable under Section 107(a) for the costs of Occurrences #4-8 means that PMC cannot obtain contribution from it under CERCLA for those costs, for liability under Section 113(f)(l) is premised upon liability under Section 107(a). 42 U.S.C. § 9613(f)(1). Therefore, only PMC's past costs in connection with Occurrence #9 and future remediation costs are at issue under Section 113(f)(1).

There is no limitation on the equitable factors that we may consider in deciding how the response costs should be allocated. "[I]n any given case, a court may consider several factors, a few factors, or only one determining factor, . . . depending on the totality of the circumstances presented to the court." Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 509 (7th Cir. 1992). Most courts use what are commonly called the "Gore factors",[4/] which are:

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
>
> (ii) the amount of the hazardous waste involved;
>
> (iii) the degree of toxicity of the hazardous waste involved;

[4/] The "Gore factors" are so named because they were originally proposed by then-Congressman Al Gore as part of amendment to the 1980 House Superfund bill that did not pass. See id. at 508.

> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
>
> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
>
> (vi) the degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment.

Id. at 508. The existence of a contract between the parties that bears on the allocation of clean-up costs may also be relevant. Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994).

Based in large part upon the testimony of PMC's expert Ray Forrester ("Forrester"), whose testimony was the most persuasive and credible of the expert witnesses, this Court has found that the remediation of the PMC Facility will be driven by the presence of leachable lead and other metals, which occur throughout the entire site at concentrations exceeding applicable clean-up objectives. We have also found that Sherwin-Williams is solely responsible for the presence of those hazardous substances because they are not used or produced by PMC in its operations. Moreover, we have determined that any contamination caused by PMC will necessarily be remediated in the course of remediation of the entire site driven by the presence of leachable lead and other metals. And in the Opinion we found that under the Purchase Agreement Sherwin-Williams had retained the environmental liabilities at the site.

On the basis of these factors, which we find controlling under the totality of the circumstances of this case,[5/] we conclude that Sherwin-Williams should be allocated 100% of the costs as-

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[5/]As a consequence, we do not consider all of the enumerated "Gore factors."

sociated with Occurrence #9, and we declare that it shall be solely responsible for all future remediation costs at the PMC Facility. Therefore, judgment is entered in favor of PMC on Count II as to Occurrence #9 and the future remediation costs.

III. Liability Under the Illinois Contribution Act (Count III)

This Court decided some time ago in ruling on Sherwin-Williams' motion to dismiss (see Memorandum Opinion and Order of July 6, 1993, 1993 WL 259442) that PMC stated a claim under the Illinois Contribution Act based upon the environmental liability imposed upon it by the IEPA (namely, the 4(q) Notice). PMC seeks to recover some or all of its costs associated with Occurrences #4-9 in this claim. Because we have already concluded that PMC can recover its response costs for Occurrence #9 under Sections 107(a) and 113(f) of CERCLA, we address the contribution claim only as to Occurrences #4-8.

To recover under the Illinois Contribution Act based on environmental liability, a plaintiff must show only that both it and a third-party are subject to liability in tort to the State and that their liability arises out of the same injury. People v. Brockman ("Brockman II"), 592 N.E.2d 1026, 1029 (Ill. 1992). That the parties are concurrent or successive tortfeasors is sufficient to satisfy the "same injury" prong; they need not be joint tortfeasors. Id. at 1030.

This Court has already found that in each of Occurrences #4-8, Sherwin-Williams was the sole source of the contaminants found in the excavated soil (or, in the case of Occurrence #5, of a contaminant that alone required disposal of the soil as a hazardous waste). Although Sherwin-Williams argues that PMC has contributed to the contamination at the PMC Facility, Sherwin-Williams did not present evidence at trial showing that PMC's actions caused the contamination found in the soil during those occurrences. Rather, with the exception of toluene and 1,2,4-trichlorobenzene, all of the hazardous substances identified re-

sulted solely from Sherwin-Williams' past operations and disposal practices at the site. It is thus clear from the evidence that Sherwin-Williams is subject to liability in tort to the State for its contamination of the PMC Facility and that its liability arises from the same injury (namely, the contamination) as does PMC's. Thus, PMC is entitled to contribution from Sherwin-Williams for its responses costs associated with Occurrences #4-8.

Sherwin-Williams contends that PMC's actions so amplified the costs that it is not entitled to recover them from Sherwin-Williams. However, the evidence has shown that Sherwin-Williams' proposed remedy of returning the contaminated soil to the ground, thereby avoiding the disposal costs, was rejected by the IEPA. Moreover, the mischaracterization of the hazardous waste in Occurrence #4 was a matter of judgment, as Sherwin-Williams' own expert acknowledged when he questioned the IEPA's determination. As a result, PMC's costs associated with Occurrences #4-8 were reasonable.

Because the contaminants found in the soil during each of the occurrences came from Sherwin-Williams' operations and not PMC's, this Court concludes that PMC is entitled to contribution in the amount of 100% of its response costs as to Occurrences #4-8. Judgment is entered in PMC's favor on Count III.

IV. Liability Under RCRA (Count IV)

Section 6972(a)(1)(B) of RCRA permits an action by any person:

> against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

42 U.S.C. § 6972(a)(1)(B). Among other things it permits the court to enjoin any person from contributing to the presence of hazardous materials and to order such a person to take a specific action to abate past contamination. 42 U.S.C. § 6972(a). Such an injunction may require a party to take responsibility for the remediation of a site contaminated by hazardous waste. Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1254 (1996). Section 6972(e) permits a successful plaintiff to recover its attorneys' fees and costs from the responsible party. 42 U.S.C. § 6972(e).

A plaintiff must establish three elements to be entitled to injunctive relief under RCRA. The first is that the conditions at the site may present an imminent and substantial endangerment. Craig Lyle Ltd. Partnership v. Land O'Lakes, 877 F. Supp. 476, 480 (D. Minn. 1995). The second is that the endangerment must stem from a RCRA solid or hazardous waste. Id. And the third is that the defendant has contributed or is contributing to the handling, treatment, transportation or disposal of such waste. Id.

PMC asserts that its evidence satisfies those three elements. For the first element, it points to the 4(q) Notice from the IEPA, which stated that "[t]he releases of hazardous substances at, from, or attributable to the [PMC Facility] and the continuing threat of release present an immediate and significant risk of harm to human health, welfare and the environment." For the second, it notes that lead, arsenic and other metals found at the site are RCRA solid and hazardous wastes. See 40 C.F.R. 261.1(a)(2). For the third, it argues that the contaminants at issue result from Sherwin-Williams' past operations and disposal practices at the PMC Facility and that such contaminants are also migrating from the Current Sherwin-Williams Site to the PMC Facility.

Sherwin-Williams challenges PMC's RCRA claim on two grounds. First, it asserts that RCRA claims are not available to non-innocent landowners who have a remedy under Section 113(f) of CERCLA. We find this argument unpersuasive. Nothing in RCRA limits recovery to innocent landowners (who would most likely have a remedy under Section 107(a) of CERCLA anyway, depending upon the type of hazardous waste at issue).

While it is clear from the case law that restitutionary relief for completed remediation efforts is not available, see Meghrig, 116 S. Ct. at 1254-56, there is no prohibition against recovery relating to contamination that has not been abated. As a result, we conclude that PMC is entitled to relief under RCRA despite its remedy under Section 113(f) of CERCLA.

Sherwin-Williams also contends that PMC has not shown that there is an "imminent and substantial endangerment to health or the environment" from the site. But the 4(q) Notice shows that the IEPA thinks otherwise, and while the notice is not conclusive on the issue, it is certainly relevant evidence that we may properly consider. In addition, although Sherwin-Williams asserted in its trial brief that Forrester would testify that there is no "imminent and substantial endangerment" presented by the contamination at the site, he in fact testified that leachable lead and other metals are present at elevated levels in the soil and pose a risk to the groundwater. (Tr. Trans. at 183).

PMC's claim regarding migration of contaminants from the Current Sherwin-Williams Site is another matter. While its evidence that Sherwin-Williams was the source of existing contamination at the PMC Facility was extensive, much of the historical evidence tied the contamination to Sherwin-Williams' past operations and disposal practices at the site itself. PMC has not shown that the contamination now present at the PMC Facility results to any measurable degree from contaminants that have migrated or are currently migrating from the Current Sherwin-Williams Site.

This Court concludes that PMC has proven the three elements of a claim for injunctive relief under RCRA and is therefore entitled to an injunction requiring Sherwin-Williams to remediate the PMC Facility. However, PMC is not entitled to an injunction requiring Sherwin-Williams to take action to prevent the migration of contamination from the Current Sherwin-Williams Site to the PMC Facility. Finally, because PMC is entitled to relief under RCRA, it is also entitled to recover its attor-

neys' fees and costs from Sherwin-Williams. Judgment is therefore entered in favor of PMC on Count IV.

V. Declaratory Relief

In Count XII PMC seeks declaratory relief under both the Illinois Declaratory Judgment Act, 735 ILCS § 5/2-701, and the federal Declaratory Judgment Act, 28 U.S.C. § 2201. PMC premises its claim for declaratory relief upon its Section 107(a) CERCLA claim. However, PMC has not prevailed on its Section 107(a) claim, and it is therefore not entitled to the declaratory relief it seeks. Therefore, judgment is entered in favor of Sherwin-Williams on Count XII.

Conclusion

For the reasons set forth in this memorandum opinion and order, and based upon the findings of fact and conclusions of law contained herein, this Court enters the following judgment:

1. PMC has failed to prove that it is entitled to relief under Section 107(a) of CERCLA as to Occurrences #4-8, and judgment is therefore entered in favor of Sherwin-Williams on Count I as to those occurrences. Sherwin-Williams has stipulated that PMC's actions as to Occurrence #9 were necessary and consistent with the NCP, and PMC is therefore entitled to recover its response costs as to that occurrence from Sherwin-Williams. Judgment is therefore entered in favor of PMC on Count I as to Occurrence #9.

2. PMC has proven its claim for contribution under Section 113(f) of CERCLA. PMC may recover from Sherwin-Williams 100% of its response costs associated with Occurrence #9, and Sherwin-Williams is also responsible for the 100% of the future costs of remediation at the PMC Facility. Judgment is entered in favor of PMC on Count II.

3. PMC has proven its claim under the Illinois Contribution Act and is entitled to recover 100% of its response costs

as to Occurrences #4-8. Judgment is entered in favor of PMC on Count III.

4. PMC has proved that it is entitled to injunctive relief against Sherwin-Williams under RCRA. This Court therefore orders Sherwin-Williams to take full responsibility for the future remediation of the PMC Facility. PMC is also awarded its attorneys' fees and costs under RCRA in amounts to be determined later. Judgment is entered in favor of PMC on Count IV.

5. Because PMC did not prevail on its Section 107(a) claim under CERCLA, it cannot show that it is entitled to declaratory relief. Judgment is entered in favor of Sherwin-Williams on Count XII.

ENTER: /s/ Paul E. Plunkett

UNITED STATES DISTRICT JUDGE

DATED: 4-23-97

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGEMENT IN A CIVIL CASE

PMC, Inc., a
Delaware Corporation
v.

CASE NUMBER: 93 C 1379

The Sherwin-Williams
Company, an Ohio
corporation

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of PMC, Inc. on Counts I, II, III and IV and against defendant Sherwin-Williams Company. Judgment is entered in favor of Sherwin-Williams Company on Count XII and against plaintiff PMC, Inc.

April 23, 1997
Date

Michael W. Dobbins
Clerk

/s/ Shelia Moore
(By) Deputy Clerk